STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. WILLIAM E. PARMINTER, APPELLEE AND CROSS-APPELLANT.

___ N.W.2d ___

Filed April 26, 2012. Nos. S-11-765, S-11-766.

1. **Sentences: Appeal and Error.** When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court reviews for an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Sentences.** A sentencing court is not limited in its discretion to any mathematically applied set of factors.
4. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
5. ____. A sentencing court must have some reasonable factual basis for imposing a particular sentence.
6. **Sentences: Appeal and Error.** In determining whether a sentence is excessively lenient, an appellate court considers the following factors: (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed to afford deterrence; (4) the need for the sentence to protect the public from further crimes of the defendant; (5) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (6) the need for the sentence to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (7) any other matters appearing in the record that the appellate court deems pertinent.
7. ____: ____. If an appellate court determines that a sentence is excessively lenient, it may set aside the sentence and do one of the following: (1) remand the cause for imposition of a greater sentence; (2) remand the cause for further sentencing proceedings; or (3) impose a greater sentence.

Appeals from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Reversed and remanded with directions.

Joe Kelly, Lancaster County Attorney, Patrick F. Condon, Daniel D. Packard, and James J. Krauer, Senior Certified Law Student, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn D. Elliott for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The State, through the Lancaster County Attorney, appeals from a district court order sentencing William E. Parminter for aggravated driving under the influence (DUI), third offense, and DUI, fourth offense. The State argues that the sentences were excessively lenient.[1] Because we conclude that the sentences imposed by the district court fail to adequately protect the public from Parminter, the district court's sentences were excessively lenient. We reverse, and remand with directions to impose consecutive sentences of 5 to 5 years in prison.

BACKGROUND

Shortly before noon on May 14, 2010, Lincoln police stopped Parminter's vehicle. Police had received a report that Parminter was driving on a suspended license.

During the stop, the officer observed beer cans in Parminter's vehicle, many of which were open. In addition to seeing open beer cans, the officer also smelled alcohol on Parminter. Parminter had bloodshot, watery eyes, and the officer noticed that his speech was slurred. Parminter admitted to the arresting officer that he had been drinking. After failing field sobriety tests and a preliminary breath test, police arrested him. A test revealed a breath alcohol content of .13 of a gram of alcohol per 210 liters of breath. The State eventually filed an information charging Parminter with DUI, fourth offense[2]; driving under suspension before reinstatement[3]; and no proof of insurance.[4]

On January 20, 2011, Parminter appeared in court on the charges relating to his May 14, 2010, arrest. An arresting officer from his prior DUI was scheduled to testify against

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[1] See Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2010).

[2] See, Neb. Rev. Stat. § 60-6,196 (Reissue 2010); Neb. Rev. Stat. § 60-6,197.03(7) (Supp. 2009).

[3] See Neb. Rev. Stat. § 60-4,108 (Reissue 2004).

[4] See Neb. Rev. Stat. § 60-3,167 (Reissue 2010).

Parminter. Before testifying, the officer became aware that Parminter's vehicle was parked on the street in front of the courthouse. The officer ran a check on Parminter's license and learned that it had been "suspended and revoked." After the hearing, about 11:45 a.m., the officer watched Parminter exit the courtroom by himself. He followed Parminter and saw him get into the driver's seat of his vehicle and drive away. The officer followed Parminter, turned on his vehicle's emergency lights, and stopped Parminter. During the stop, the officer detected a "strong odor of alcohol." After placing Parminter under arrest, the officer observed a cold, half-empty can of beer in the cupholder of Parminter's vehicle. The officer also saw several empty cans of beer in the car and several full, unopened cans of beer. A test showed Parminter's breath alcohol content to be .238 of a gram of alcohol per 210 liters of breath.

Based on this second incident, the State filed an information charging Parminter with aggravated DUI, third offense[5]; driving during revocation[6]; and no proof of insurance.[7]

Parminter eventually pleaded no contest to both DUI charges in exchange for the State's dropping the other charges. And the State proved his prior DUI's for enhancement. The court sentenced Parminter to 12 to 18 months in prison on the DUI, fourth offense. The court gave him credit for 212 days served. On the aggravated DUI, third offense, the court sentenced him to 12 to 24 months in prison. The court gave him credit for 13 days served. The court ordered that he serve the sentences concurrently.

ASSIGNMENTS OF ERROR

In both cases, the State contends that the district court erred in imposing an excessively lenient sentence on Parminter.

STANDARD OF REVIEW

[1,2] When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court

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[5] See, § 60-6,196; § 60-6,197.03(6) (Reissue 2010).

[6] See § 60-4,108 (Reissue 2010).

[7] See § 60-3,167.

reviews for an abuse of discretion.[8] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[9]

ANALYSIS

Both of the offenses to which Parminter pleaded no contest—DUI, fourth offense, and aggravated DUI, third offense—are Class IIIA felonies. Class IIIA felonies generally do not have a minimum sentence.[10] But the specific DUI statutes under which the court sentenced Parminter require that Parminter serve at least 180 days in jail.[11] The maximum sentence for a Class IIIA felony is 5 years in prison, a $10,000 fine, or both.[12] Parminter's sentences of 12 to 18 months and 12 to 24 months are within these statutory limits. So we review them for an abuse of discretion.[13]

[3-5] A sentencing court is not limited in its discretion to any mathematically applied set of factors.[14] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[15] But the court must have some reasonable factual basis for imposing a particular sentence.[16]

[6] In determining whether the sentence is excessively lenient, we consider the following factors: (1) the nature and circumstances of the offense; (2) the history and characteristics

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[8] See *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008).

[9] *Id.*

[10] Neb. Rev. Stat. § 28-105 (Reissue 2008).

[11] See § 60-6,197.03(6).

[12] § 28-105.

[13] See *Moore, supra* note 8.

[14] *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

[15] *Id.*

[16] See *id.*

of the defendant; (3) the need for the sentence imposed to afford deterrence; (4) the need for the sentence to protect the public from further crimes of the defendant; (5) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (6) the need for the sentence to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (7) any other matters appearing in the record that the appellate court deems pertinent.[17]

The presentence investigation reveals that Parminter has fought a long battle with alcoholism. Parminter, who was 55 at the time of sentencing, reported that he began drinking in his mid- to late teens. Over the years, his dependence on alcohol worsened. He reported that beginning in his thirties, he would drink a 12-pack of beer and some whiskey every day. He reported that even after his May 14, 2010, arrest, he was drinking to the point of intoxication daily, even though he was out on bond under an order that specifically forbade him from consuming alcohol. Further, he reported that he was still craving alcohol as late as April 2011.

Parminter's affliction with the drink has led to multiple DUI charges. In fact, it appears that the current charges are his eighth and ninth charges for DUI. In a substance abuse evaluation completed in 2006, Parminter estimated that he had driven under the influence "'maybe' 100 or more times." Equally unsettling, in 2004, police arrested Parminter twice for DUI—in April and again in May. The presentence report shows that both charges were resolved in February 2006. So, the current case represents the *second* instance in which Parminter has been arrested for DUI while currently on trial for another DUI.

Commendably, Parminter has tried several times to conquer his addiction—unfortunately, his successes have been short lived. Although he may achieve some measure of temporary success, he has always relapsed and fallen into his old (and

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[17] See, Neb. Rev. Stat. § 29-2322 (Reissue 2008); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005).

dangerous) habits. As Parminter himself said, "'[i]t seems every four years I get a DUI. I'll be sober for four years, and then something happens.'"

Parminter does seem to have a desire to get treatment. In the proceedings before the trial court, he unsuccessfully moved for a pretrial release so that he could go into inpatient treatment. The record also reflects other attempts at treatment, including several stays at inpatient facilities.

Applying several of the factors in § 29-2322, we believe the trial court's sentences were excessively lenient. In both cases, Parminter was driving drunk without a valid license around noon. In the second case, an officer arrested him leaving a hearing for a prior charge of DUI without a valid license. In that case, his breath alcohol content was nearly three times the legal limit. Moreover, these are Parminter's eighth and ninth charges for DUI. By providence or dumb luck, Parminter has escaped maiming or killing an innocent person. Prior punishments have fallen on deaf ears. Parminter's repeated serious offenses demand a stiff punishment. Further, Parminter is a risk to the public's safety. And "protection of the public requires certainty, not chance, and the only certainty we can perceive is that [Parminter] cannot drink and drive while incarcerated."[18]

[7] If we determine that a sentence is excessively lenient, we may set aside the sentence and do one of the following: (1) remand the cause for imposition of a greater sentence; (2) remand the cause for further sentencing proceedings; or (3) impose a greater sentence.[19] We choose to impose consecutive sentences of 5 to 5 years.

We note that Parminter also cross-appealed, claiming that the district court erred in calculating his credit for time served. But because Parminter's cross-appeal assigned error as to how credit was calculated on *concurrent* sentences and we are now imposing *consecutive* sentences, it is not necessary for us to address his cross-appeal.

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[18] *Rice, supra* note 17, 269 Neb. at 724, 695 N.W.2d at 424.

[19] Neb. Rev. Stat. § 29-2323 (Reissue 2008).

CONCLUSION

We conclude that the district court abused its discretion in imposing an excessively lenient sentences on Parminter. We reverse, and remand with directions to resentence Parminter to consecutive terms of 5 to 5 years. The district court must also revoke Parminter's license according to the applicable statutes.[20] Finally, the court must give Parminter credit for the time he has already served.[21] We leave it to the district court to determine the credit to Parminter for the time served.

REVERSED AND REMANDED WITH DIRECTIONS.

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[20] See § 60-6,197.03(6) and (7).

[21] See Neb. Rev. Stat. § 83-1,106 (Reissue 2008). See, also, Neb. Rev. Stat. § 29-2324 (Reissue 2008).

WILLIAM SELLERS, APPELLANT, V. REEFER SYSTEMS, INC., APPELLEE.

___ N.W.2d ___

Filed April 26, 2012. No. S-11-909.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation: Stipulations.** Before an order for future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease.

Appeal from the Workers' Compensation Court. Affirmed.

Joel D. Nelson, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellant.

Sonya K. Koperski, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellee.